

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

Rivier College

DECISION OF THE HEARING OFFICER

Appearances: Mickey Long, Esq., representing the claimant
J. Daniel Marr, Esq., representing Rivier College, Early Childhood Center

Nature of Dispute: RSA 275-E:2 I (a) - Protection Of Employees Reporting Violations, Illegal Termination For Protected Reporting

RSA 275-E:2 I (b) -Protection Of Employees Reporting Violations, Illegal Termination For Protected Participation In An Investigation, Hearing, Or Inquiry

Employer: Rivier College, 420 S. Main Street, Nashua, NH 03060

Date of Hearing: April 20, 2011

Case No.: 40940

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant alleges she was illegally terminated on November 18, 2010 because she reported to her employer, and contacted Division for Children, Youth, and Families (hereafter DCYF) as required by RSA 169-C:29, she suspected a child (hereafter Child A) in the employer's early childhood center was being sexually abused.

Rivier College Early Childhood Center argues the claimant was not terminated for her protected reporting of abuse, but for violations of their written policy. They claim she was terminated for failing to maintain the confidentiality of the matter concerning Child A and for failing to report the matter to senior administration until she had conducted her own investigation for a day and a half, and that both of these infractions are in direct violation of the employer's written policy.

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Sharon Saalfeld, stenographer, was retained by the claimant.

The Hearing record was left open for the submission of written closing statements until May 13, 2011. Attorney Long requested an extension on May 11, 2011. An extension was granted to both parties until May 18, 2011. Written closing statements were received by this Department within the required timeframe.

FINDINGS OF FACT

The claimant worked as the school nurse for the employer. On November 15, 2010, the claimant was called into the Chameleon room to assess Child A. While changing Child A's diaper, a teacher was concerned with the appearance of the child's genitalia. The claimant testified the teacher suspected Child A was being sexually abused and asked her to look at Child A. The claimant performed a quick physical and visual examination of Child A, and thought there might be an anatomical anomaly or cultural variation responsible for the appearance of the child's anatomy. The child was in no distress during the examination. The claimant credibly testified she did not suspect Child A was a victim of sexual abuse. Subsequently, because Child A's anatomy looked unusual, the claimant did discuss Child A with other teachers in different classrooms who had had exposure to the child in the past. She further researched anatomical differences of the child's ethnicity on the internet after her discussions with the other teachers. After not getting much information, the claimant continued with her normal duties for the remainder of the day. Prior to falling asleep that night, she thought there was one other teacher she could speak to who had contact with Child A previously in the Columba room who might have some additional information, and made a note to do so the next day.

On November 16, 2010, the claimant contacted the teacher in the Columba room, where Child A was cared for as an infant. After speaking with the teacher in this room, the claimant then began to suspect Child A might be a victim of sexual abuse. The claimant notified the teacher she was going to speak with Linda Connelly, one of the Co-Interim Directors. She waited outside Ms. Connelly's office for about ten minutes, as Connelly was in a meeting. After speaking with Ms. Connelly, the decision was made to speak with Mary McNeil, the other Co-Interim Director. Both Ms. Connelly and the claimant met with Ms. McNeil at 11:30am, as McNeil had been out of the office. During this meeting, Ms. Connelly told a story about her own family who was "torn apart" by a fabricated child abuse report, which made the claimant uncomfortable. As a result of the meeting, both Co-Interim Directors asked the claimant if she felt comfortable contacting DCYF to make the report of the suspected abuse. She said that she did and subsequently made the report to DCYF at approximately 2:30pm. She further noted she did not report who she thought might be the abuser, as she didn't know, only that there was a suspicion of sexual abuse. DCYF took the complaint as a "level one" complaint and stated there would be an assessment/investigation. On November 17, 2010, the claimant arrived at work as usual, performing her normal duties and made several calls to DCYF to see if there were any results from any examination of Child A. No information was available. On November 18, 2010, again the claimant arrived at work to perform her regular duties. She contacted DCYF that morning, and was told the examination did not find evidence of sexual abuse. She relayed this information to Ms. Connelly. At approximately 1:30pm she was called into a meeting with Ms. Connelly and

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Ms. McNeil and terminated for violating the employer's written policy by failing to maintain the confidentiality of the matter concerning Child A and for failing to report the matter to senior administration until she had conducted her own investigation for a day and a half.

The claimant admitted the conversations regarding Child A took place in classrooms around children, but the ages of the children would inhibit their ability to understand the conversations, as well as having limited verbal skills. Some of the classrooms do have observation rooms which allow parents and others to view the classrooms without the knowledge of the teachers, though a light switch is supposed to be turned on when the observation rooms are being used, it is not always used. The claimant did not take note of the light switch being on during these discussions, but the switch being off would not reliably signify the observation room was not being used. She also noted all conversations were in areas away from the children and the volumes of the discussions were in hushed to low tones. The claimant credibly testified she was aware of the employer's written policies and believed she was in compliance with those policies, as she was not performing an investigation of suspected child abuse on November 15, 2010, nor did she feel any of her discussions about Child A were in violation of the employer's confidentiality policy.

The employer, through discussions and written statements from the teachers involved, determined the claimant violated their written policies. Specifically, according to the Reporting Child Abuse and Neglect policy "Any staff member that suspects child abuse or neglect should keep accurate documentation of any incidents and bring the matter to the attention of the Director" as well as "All teachers are required by law in the NH Code of Administrative Rules to report suspected abuse, physical, sexually, emotional or neglect to the Division for Children, Youth and Families" and further in the Child Abuse Staff Responsibilities policy "All employees of the Center are required to report immediately to the Director whenever they have reason to suspect that a child has been abused or neglected". The claimant testified to having these written policies prior to this incident.

Further, the claimant signed an Employee/Student Policy on Client Confidentiality statement on August 16, 2010 which reads as follows: "Information pertaining to a child/family is confidential. Child /family situations must not be disclosed or discussed with other children/families, community residents, or any other person outside the Early Childhood Center. Employee/Students should be aware that breach of child/family confidentiality is against the law and could result in a liability suit against that employee/student. If there are any questions regarding a child's development or behavior it would be appropriate to ask that child's teacher, or the Early Childhood Center Program Coordinators or Program Director. Categorical exceptions involving networking or cooperative programs or other exceptions resulting from special circumstances can be obtained from the Program Director. Exceptions must include a signed family release form. Failure to adhere to this policy will result in disciplinary action and/or immediate dismissal."

The employer held a genuine belief the claimant suspected Child A might be the victim of sexual abuse as of the morning of November 15, 2010, and began an investigation into that abuse, instead of immediately notifying the employer of the

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suspicions in accordance with their written policy. They also believed the claimant's discussion with the other teachers was not in accordance with maintaining the confidentiality of the matter concerning Child A, as the discussions were in front of children and potentially in front of other parents who may have been viewing the classrooms from one way mirrors.

DISCUSSION AND CONCLUSIONS

As required by Appeal of Mary Ellen Montplaisir 147 N.H. 297 (2001), this Department is required to apply a "mixed motive analysis" on the evidence presented. Because of the circumstantial nature of the evidence alleged by the claimant, the analytical framework of a "pretext analysis" is appropriate. Under this analytical framework, the claimant has the initial burden of establishing a *prima facie* case of unlawful conduct/retaliation. This requires the claimant to show:

1. she engaged in an act or acts protected by the statute;
2. she suffered an action proscribed by the statute (termination); and
3. there was a causal connection between the protected acts she engaged in (her report to DCYF that child abuse was suspected in one of the children enrolled in their daycare) and the action she suffered as a result of that/those protected act/s (termination).

The establishment of a *prima facie* case creates a presumption that the employer unlawfully retaliated against the claimant. The burden of proof then shifts to the employer to rebut the claimant's assertions with evidence that their action was taken for legitimate, non-retaliatory reason(s). This burden of proof is only one of production. The claimant retains the burden of proof to persuade. In response to the employer's rebuttal, the claimant has the opportunity to show that the proffered legitimate, non-retaliatory reason for the action was not the true reason for the unlawful conduct/retaliation, and that her assertion was the true reason for the unlawful conduct/retaliation. The claimant can show this by establishing that the employer's proffered reason for the action is either not credible, or by directly showing that the action was more likely motivated by retaliation in response to her protected acts.

The claimant establishes a *prima facie* case of illegal termination. She reported to the employer she suspected a child enrolled in their early childhood center might be the victim of sexual abuse, and contacted DCYF, as required by statute. The claimant was subsequently fired by the employer. There is a causal connection between her protected reporting and her termination.

The employer effectively rebuts the claimant's assertions with evidence that they terminated the claimant for legitimate, non-retaliatory reasons. The employer terminated the claimant for violating their written policy by failing to maintain the confidentiality of the matter concerning Child A and for failing to report the matter to senior administration until she had conducted her own investigation for a day and a half.

The Hearing Officer finds that the claimant failed to show that the proffered legitimate, non-retaliatory reasons for this termination are not the true reasons for this termination, or that her assertion was the true reason for the termination. The claimant, therefore, failed to prove by a preponderance of the evidence that she was terminated in retaliation for her protected reporting.

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DECISION

Based on all the testimony and evidence presented, as this Department finds that the claimant failed to prove by a preponderance of the evidence that she was terminated

in retaliation for her protected reporting, it is hereby ruled that the Whistleblower's Claim is invalid.

Melissa J. Delorey
Hearing Officer

Date of Decision: June 9, 2011

Original: Claimant

cc: Employer

MJD/all

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